

IN THE SUPREME COURT OF THE STATE OF DELAWARE

EVERETT THOMAS,	§
	§
Defendant Below-	§ No. 300, 2008
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for Sussex County
	§ Cr. ID 0708010661
Plaintiff Below-	§
Appellee.	§

Submitted: December 18, 2008

Decided: February 23, 2009

Before **HOLLAND, BERGER**, and **JACOBS**, Justices.

ORDER

This 23rd day of February 2009, upon consideration of the appellant's Supreme Court Rule 26(c) brief, his attorney's motion to withdraw, and the State's response thereto, it appears to the Court that:

(1) A Superior Court jury found the defendant-appellant, Everett Thomas (Thomas), guilty of two counts of driving a motor vehicle in a wildlife area, two counts of disposing or discharging solid waste materials, and three counts of disposing or discharging solid waste without a transporter's permit from the Department of Natural Resources and Environmental Control (DNREC). The Superior Court sentenced Thomas to

ten days at Level V incarceration and also fined him \$2700. This is Thomas's direct appeal.

(2) Thomas's counsel on appeal has filed a brief and a motion to withdraw pursuant to Rule 26(c). Thomas's counsel asserts that, based upon a complete and careful examination of the record, there are no arguably appealable issues. By letter, Thomas's attorney informed him of the provisions of Rule 26(c) and provided Thomas with a copy of the motion to withdraw and the accompanying brief. Thomas also was informed of his right to supplement his attorney's presentation. Thomas filed a letter containing ten numbered paragraphs. The State has responded to Thomas's points, as well as to the position taken by Thomas's counsel, and has moved to affirm the Superior Court's judgment.

(3) The standard and scope of review applicable to the consideration of a motion to withdraw and an accompanying brief under Rule 26(c) is twofold: (a) this Court must be satisfied that defense counsel has made a conscientious examination of the record and the law for arguable claims; and (b) this Court must conduct its own review of the record and

determine whether the appeal is so totally devoid of at least arguably appealable issues that it can be decided without an adversary presentation.¹

(4) The record reflects that Thomas was paid by Sea Watch International, a clam processor, to haul away clam by-products from its facility in Milford, Delaware. At trial, Gregory Townsend testified that he lives adjacent to the Marsh Hope Wildlife Area near Bridgeville, Delaware. On August 4, 2007, Townsend investigated a foul-smelling odor and discovered a pile of clam waste near a ditch in the wildlife area. He reported the incident to authorities. The following day, Townsend saw a red dump truck leaving the site and found a second pile clam waste near the first pile. Townsend again reported the incident. The following week, when Thomas picked up his next load of clam waste from Sea Watch, DNREC officers followed him, noting several moving violations en route, until Thomas dumped his load of clam waste on the side of a road in Maryland. Thomas did not have a permit to transport solid waste, which is required in Delaware.

(5) Although Thomas filed a ten-paragraph letter in response to his counsel's motion to withdraw, his letter raises only three distinct issues for the Court's consideration. First, he challenges the admission of a

¹ *Penson v. Ohio*, 488 U.S. 75, 83 (1988); *McCoy v. Court of Appeals of Wisconsin*, 486 U.S. 429, 442 (1988); *Anders v. California*, 386 U.S. 738, 744 (1967).

photograph of his truck taken by the DNREC officers because the photograph was taken in Maryland, outside of DNREC's jurisdiction. Second, he challenges the credibility of Townsend's identification of his truck. Finally, Thomas contends that the evidence against him was insufficient to support a guilty verdict because his driving log book proves that he could not have dumped clam waste on the dates alleged.

(6) With respect to the photograph of Thomas's truck, defense counsel objected to the photograph on the ground that the prosecutor was unduly leading Townsend in his identification of the Thomas's truck. The trial court overruled defense counsel's objection and permitted the photograph to be admitted into evidence. There was no mention on the record that the photograph was taken in Maryland and no objection to the photograph was made on this ground. Because Thomas admitted that the photograph was an accurate depiction of his truck and the photograph was admitted for the purpose of confirming Townsend's description of the truck he saw leaving the Marsh Hope Wildlife Area, the location of the truck at the time the photograph was taken simply was not relevant. Accordingly, we find no merit to Thomas's argument on appeal.

(7) We next review Thomas's challenges to the credibility of Townsend's testimony and to the overall sufficiency of the evidence to

sustain his convictions. In reviewing a sufficiency of the evidence claim, this Court must determine whether, viewing the evidence in the light most favorable to the State, *any* rational trier of fact could find the defendant guilty beyond a reasonable doubt.² In doing so, the Court does not distinguish between direct and circumstantial evidence.³ In this case, we find the evidence was more than sufficient to sustain Thomas's convictions. Townsend testified that, on two occasions, he smelled rotten waste immediately after seeing Thomas's truck leaving the wildlife area adjacent to his property. Furthermore, Kenneth Carroll, an executive of Sea Watch, identified the clam waste as coming from Sea Watch and testified that Thomas was the only hauler who transported such quantities of waste from the plant. Carroll also testified that the nearest plants that produced similar clam waste were in Virginia and New Jersey. Under these circumstances, we find the evidence sufficient to sustain Thomas's convictions beyond a reasonable doubt. To the extent Thomas challenges the credibility of Townsend's testimony, it was for the jury to determine the weight of the evidence and to resolve any conflicts in the testimony.⁴

² *Word v. State*, 801 A.2d 927, 929 (Del. 2002) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

³ *Skinner v. State*, 575 A.2d 1108, 1121 (Del. 1990).

⁴ *Tyre v. State*, 412 A.2d 326, 330 (Del. 1980).

(8) This Court has reviewed the record carefully and has concluded that Thomas's appeal is wholly without merit and devoid of any arguably appealable issue. We also are satisfied that Thomas's counsel has made a conscientious effort to examine the record and the law and has properly determined that Thomas could not raise a meritorious claim in this appeal.

NOW, THEREFORE, IT IS ORDERED that the State's motion to affirm is GRANTED. The judgment of the Superior Court is AFFIRMED. The motion to withdraw is moot.

BY THE COURT:

/s/ Carolyn Berger
Justice